IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL L. DRAKE, a single man, Appellant, v. ROBERT R. BURGESS and JOANN M. BURGESS, husband and wife, and the marital community comprised thereof, Respondents. MICHAEL L. DRAKE, a single man, Third-Party Appellant, v. JONATHAN PAUL OWEN, an individual, Third-Party Respondent.	)	No. 62800-3-I DIVISION ONE UNPUBLISHED FILED: August 24, 2009

Cox, J. — Michael Drake appeals the trial court's judgment entered following remand from this court, arguing that the trial court improperly expanded the scope of the prescriptive easement that was the subject of the prior appeal. Drake also appeals the court's award of attorney fees and costs against Paul Owen, arguing that the court abused its discretion by awarding less than

requested. He also seeks fees on appeal.

The trial court properly included in its judgment that the prescriptive easement includes within its scope "turn-around and parking." But inclusion of "utilities" within the scope of the easement was error. The court abused its discretion in determining the amounts of the fee and costs awards. As requested, Drake is entitled to fees for this appeal. We affirm in part, reverse in part, vacate in part, and remand.

The background facts regarding the dispute over the driveway easement for ingress and egress between Drake and his neighbors, Robert and Joann Burgess, husband and wife, ("the Burgesses") are contained in this court's prior opinion, Drake v. Burgess.[1] The same opinion contains the facts regarding Drake's claims against Paul Owen for breach of the warranty deed conveying certain property to Drake.[2] We repeat those facts only as necessary to resolve the disputes in this second appeal.

Upon remand, the trial court entered a judgment memorializing that the Burgesses have a "permanent non-exclusive easement for ingress, egress and utilities" over Drake's property. The judgment also prohibited Drake from using the easement in any way that would "materially interfere with the use of the easement of its intended purpose of ingress, egress, utilities, ***turn-around and parking*** . . . ."[3] Based on his view that the trial court improperly expanded the

[1] Drake v. Burgess, noted at 136 Wn. App. 1021, 2006 WL 3720404, review denied, 162 Wn.2d 1009 (2008).

[2] Drake, 2006 WL 3720404 at *13.

scope of the easement by adding the language emphasized in the preceding sentence, Drake moved for reconsideration of the judgment. The court denied the motion.

On remand from this court, Drake also prepared for a trial against Owen on damages for shortages of property due to mutual mistake.[4] Prior to trial, the parties settled on the amount of damages. The court entered judgment in favor of Drake for $64,625 in damages, plus attorney fees and costs in favor of Drake to be awarded by the court.

Drake moved for the award of $163,499.50 in attorney fees and costs. Owen opposed the motion, and the court awarded $68,100.69 in fees and costs to Drake.

Drake appeals.

SCOPE OF THE EASEMENT

Drake contends that the trial court improperly expanded the scope of the easement for "ingress and egress" by specifying that "turn-around and parking" as well as "utilities" are included within the ambit of the easement. We disagree with the first contention and agree with the second.

"Upon issuance of the mandate of the appellate court . . . the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court….

[3] (Emphasis added.)

[4] Drake, 2006 WL 3720404 at *8.

"[5] A trial court's authority to take action not in "strict conformance" with the appellate court's decision is limited to post-judgment motions raising issues not already decided by the appellate court.[6] The law of the case doctrine requires that "once there is an appellate court ruling, its holding must be followed in all of the subsequent states of the same litigation."[7] We review de novo questions of law, including the interpretation of court rules.[8]

Turn-Around and Parking

Here, the first issue on appeal is the meaning of our ruling in the prior appeal of this case. There, we observed that "Burgess and Drake agree that only the upper portion of the driveway and ***the parking/turnaround pad at the top of the driveway*** are the subjects of their dispute."[9] We also referred to a map of the easement and lots, which is in the record. A detailed discussion of the scope of the easement and rights of the respective parties in the easement area followed.

We conclude that it is clear from our opinion that, by our reference to the subjects of dispute and the discussion and resolution of the issues regarding the scope of the easement and the rights of the parties, we decided that the easement for ingress and egress includes within its scope "the upper portion of the driveway and the parking/turnaround pad at the top of the driveway." There is

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[5] RAP 12.2.

[6] Allyn v. Asher, 132 Wn. App. 371, 378-79, 131 P.3d 339 (2006); RAP 12.2.

[7] State v. Schwab, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008).

[8] Id. at 671.

[9] Drake, 2006 WL 3720404 at *3 (emphasis added).

no other reasonable interpretation of our prior opinion.

Drake appears to argue that the reference to the easement as one for "ingress and egress" excludes the activities that were litigated in this case. But as our discussion in the prior opinion made clear, the scope of a prescriptive easement is determined by the nature of use during the prescriptive period.[10] Drake cannot seriously now contend that the Burgesses did not park or turn around vehicles at the top of the driveway.

Finally, we note that logic dictates that the right to ingress and egress necessarily implies the rights to turn around and park a vehicle under the circumstances of this case. Thus, based on the clear language of our first opinion and these additional points, we conclude that the trial court properly included the words "turn-around and parking" in paragraph five of the judgment to further clarify the rights of the parties. Arguments to the contrary are unpersuasive and border on the frivolous.

Utilities

Drake also argues that the trial court erred by further describing the easement as one for "ingress, egress and utilities." We agree.

Here, the court's judgment entered on remand states, "[d]efendants Burgess, their heirs, successors, and assigns are confirmed in a permanent non-exclusive easement for ingress, egress and ***utilities***, over, along, and across Lot 2 . . . ."[11]

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[10] Drake, 2006 WL 3720404 at *5; see also Mahon v. Haas, 2 Wn. App. 560, 563, 468 P.2d 713 (1970).

The court's decision to include utilities as a purpose of this easement was incorrect for several reasons. First, the Burgesses have not litigated the question of whether they have a utilities easement by prescription or any other means. This record does not show that the Burgesses argued on summary judgment prior to the first appeal that they had acquired a utilities easement by prescription or by any other means. Thus, the question of whether this easement included utilities was not before us in the first appeal. That is why the first opinion does not mention utilities. Accordingly, the trial court's inclusion of utilities is contrary to the law of the case.

Second, the Burgesses cite to no authority, and we have found none, that permits a court to presume that a prescriptive easement exists on the basis that land has likely been used for a particular purpose for the requisite period. To the contrary, the law requires a claimant to "'prove that his use of the other's land has been open, notorious, continuous, uninterrupted, over a uniform route, adverse to the owner of the land sought to be subjected, and with knowledge of such owner at a time when he was able in law to assert and enforce his rights.'"[12]

Finally, there is no evidence in this record that the trial court determined by way of a post-judgment motion or other evidence that a prescriptive easement for utilities existed.

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[11] Clerk's Papers at 92 (emphasis added).

[12] The Mountaineers v. Wymer, 56 Wn.2d 721, 722, 355 P.2d 341 (1960) (quoting Northwest Cities Gas Co. v. Western Fuel Co., Inc., 13 Wn.2d 75, 123 P.2d 771 (1942)).

In their defense, the Burgesses assert that "no one knows where the utilities are located" that lead to their residence. They argue "[t]here is no reason to exclude underground utilities already in place from the scope of the easement, since if those utilities have been there, they have been there for well over the required 10-year period of time for prescriptive easement."[13]

These assertions fall well short of their burden to establish by evidence the elements of a prescriptive easement for utilities. Accordingly, the trial court erred by including utilities to further clarify the extent of the easement.

We hasten to add that the Burgesses should have no difficulty proving that they have a prescriptive easement for underground utilities, provided such utilities are, in fact, present and the other elements for prescription exist. We trust that the resolution of this issue will not further burden the parties or the courts with the expense and time involved in additional litigation.

ATTORNEY FEES AND COSTS

Drake challenges as inadequate the amount of attorney fees and costs the trial court awarded to him against Owen following remand after the first appeal. Specifically, he claims that the court abused its discretion by excluding the work of certain attorneys on the belief that their work was duplicative without evidence of duplication. He also claims that the court arbitrarily awarded only 50 percent of the fees and costs from trial and improperly refused to award additional fees for appeal. Because this record is inadequate to explain the amounts of the

[13] Brief of Respondent at 11.

awards by the court, we vacate and remand with instructions.

In making an award of attorney fees and costs, the trial court is required to establish a record supporting its attorney fee award that is adequate to allow a reviewing court to determine whether the award was reasonable.[14] In doing so, a court must determine that counsel expended a reasonable number of hours in securing a successful recovery for the client, exclude any duplicative or wasteful hours, and determine the reasonableness of counsel's hourly rate.[15] The amount of the recovery, while relevant to determining the reasonableness of the fee award, is not a conclusive factor.[16] If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.[17] The trial court need not segregate the time if it determines that the various claims in the litigation are "'so related that no reasonable segregation of successful and unsuccessful claims can be made.'"[18] The lack of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.[19] The determination that fees are reasonable is

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[14] Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

[15] Id. at 433-34.

[16] Id. at 433.

[17] Mayer v. City of Seattle, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000) (citing Dash Point Village Assocs. v. Exxon Corp., 86 Wn. App. 596, 611, 937 P.2d 1148 (1997)), review denied, 142 Wn.2d 1029 (2001).

[18] Id. at 80 (quoting Hume v. Am. Disposal Co., 124 Wn.2d 656, 673, 880 P.2d 988 (1994)).

[19] Mahler, 135 Wn.2d at 435.

reviewed for abuse of discretion.[20] We will reverse an award of attorney fees only if the trial court's exercise of discretion was "manifestly unreasonable or based upon untenable grounds or reasons."[21]

Here, we previously remanded to the trial court the question of the award of fees in two limited respects: Owen's breach of the warranty to defend Drake against the easement claim and Drake's mutual mistake claim regarding the fenced backyard and patio. We held that Drake was entitled to reasonable fees for both matters and directed the trial court to determine the amount of fees.[22] We also directed the trial court, pursuant to RAP 18.1, to determine the amount of fees on appeal to be awarded to Drake for these two limited matters.[23]

On remand, the trial court found that Drake's attorney's billing rates were reasonable, but that the number of attorneys working on the case lead to duplicative billing for the same or similar work.[24] The court limited its award to 50 percent of the fees charged by the two lead attorneys and two lead paralegals. The court limited Lexis charges to 50 percent of the amount shown in the supporting records.[25] The court noted that Drake failed to segregate or provide

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[20] Id. at 434.

[21] Progressive Animal Welfare Soc'y v. University of Washington, 114 Wn.2d 677, 689, 790 P.2d 604 (1990).

[22] Drake, 2006 WL 3720404 at *12-13.

[23] Id. at *13.

[24] Clerk's Papers at 201-02.

[25] Id.

any detail as to what issues were being researched except where time records provided some detail for contemporaneous dates.[26]

Fees and Costs for Trial

Drake argues there was no duplicative billing for the same or similar work. He argues there is "absolutely no evidence of waste or duplication," making it an abuse of the judge's discretion to have concluded otherwise.

We cannot tell from this record what work the court considered to be duplicative. Rather, it appears that the judge assumed that duplicative work occurred and arbitrarily awarded Drake 50 percent of the total fees for the two lead attorneys and two paralegals. This is not a proper exercise of discretion and we, accordingly, vacate the award.

The court acted similarly in awarding costs. He noted that Drake failed to segregate or provide details about the subject matter of legal research, with some limited exceptions. Thus, the court awarded only 50 percent of the requested research costs. Again, the judge did not explain why it chose to award this particular amount. The court awarded all of the other trial costs requested. Because the record is inadequate to determine whether this award amount was reasonable, we must also vacate this award and remand it for further consideration.

Although Owen has chosen not to participate in this appeal, he has an interest in its outcome. We note from examination of the two briefs of Drake in

[26] Id.

the prior appeal that Drake made some arguments that were unsuccessful on appeal. For example, Drake argued that Burgess had not acquired an ownership interest in any portion of the lot by adverse possession. Moreover, Drake argued that he should be compensated for an easement across the lot. Our prior decision did not grant either of these requests for relief.

We express no opinion on whether, following further consideration of these awards, the court should reach a different result as to the amounts to be awarded. The purpose of the remand is to substantiate the reasons for the awards.

Fees & Costs for First Appeal

During the appellate phase, two attorneys and one paralegal worked on the case. In determining the amount of this award, the judge's order again stated, "The Court believes that the large number of attorneys and paralegals handling the matter must have resulted in duplicative billing for the same or similar work."[27] Drake argues that unlike the trial phase, there were arguably not a large number of attorneys working on the appeal. The judge allowed Drake to recover all of his costs on appeal.

We also note that Drake objects to the trial court's refusal to award fees following the prior remand. This, too, should be considered by the trial court following this remand.

Because the record does not explain the basis for the judge's exclusion of

[27] See Clerk's Papers at 219.

supposedly duplicative work and refusal to award fees following the filing of our first opinion in this case, we must also vacate this portion of the award.

Again, we express no opinion on whether, following further consideration of these awards, the court should reach a different result as to the fee amount to be awarded. The purpose of the remand is to substantiate the reasons for the award.

Fees and Costs for this Appeal

Drake requests fees on appeal based on RCW 4.84.330 and RAP 18.1. As in the first appeal, Drake is also entitled to fees on appeal for this matter, which shall be limited to the two areas we previously identified in this opinion.

We note that Drake has prevailed on appeal to the extent that the trial court erred by including utilities as a purpose of the easement. Thus, he is entitled to fees on that issue. However, he did not prevail with respect to his claim that the trial court erred in specifying that the easement did not include parking and turn-around. Thus, he should not receive fees for that unsuccessful effort.

We affirm in part and reverse in part the order on judgment. We vacate the order for fees and costs, and remand both orders with instructions.

Cox, J.

WE CONCUR: